

Abstracts

The three reality circles and levels of law

HELGE SYRSTAD

When a legal system and the law as such are considered at the meta-level, an adequate and tenable systematization is required. A legal theory based on a three-layered conception of law is the so-called critical legal positivism, developed by the Finnish legal philosopher *Kaarlo Tuori*. *Tuori's* theory has gained much attention in the Nordic countries over the last years, and several legal scholars have endorsed the critical legal positivism, or at least parts of it.

According to *Tuori's* theory, modern Western law consists of three levels:

- (i) The surface level, which includes the production of o.a. statutes and other regulation, court decisions and the statements of legal science;
- (ii) The legal culture, which is general doctrines and principles of law determining the legal production at the surface level, as well as common reasoning and language among lawyers;
- (iii) The deep structure of the law, which consists of the legal principles and concepts that are determinant for the legal culture, e.g. basic human rights

and basic categories of legal reasoning.

This three-level conception of law partly resembles a much older, almost forgotten, theory by the Norwegian legal scholar G. Astrup Hoel, who in 1925 issued a thesis called »The Modern Legal Method«. Astrup Hoel, being an uncompromising opponent of all kinds of transcendent legal reasoning, turned to the logic of the German philosopher Johannes von Kries, and created a clear-cut decisionistic theory of law: The concept of law had no other elements than the free decision of the person applying statutes, regulation or non-statutory law.

Astrup Hoel's theory seemed to be an extreme form of legal realism, and contemporary legal scholars who themselves were legal realists, rejected his modern method of law, as they claimed that the theory implied unpredictability and arbitrariness in legal practice. This, however, seemed to be somewhat unfair against Astrup Hoel. Like Tuori, he operated with a three-level conception of law, the levels being called »circles of reality«:

- (i) The first circle of reality, which consists of constituting legal facts such as agreements, damages or administrative orders;
- (ii) The second circle of reality, which we could call the sources of law, e.g. statutes, preparatory works, court decisions and non-statutory law;
- (iii) The third circle of reality, which consists of general principles and determinant considerations of law.

Although not parallel, Tuori's levels and Astrup Hoel's circles of reality express a systematization of law that o.a. aims at

securing predictability in a positivistic legal theory. Furthermore, the three-layered conception of law appears to be adequate from a pedagogic point of view, as it elucidates some basic hierarchical elements of a legal system. However, there is a danger that the conception is misleading, as the three layers do not express a strict hierarchy of norms. Constitutional norms may e.g. appear on all three layers. Even so, in an attempt to uphold a positivistic theory of law, a three-layered conception of law seems to be a fruitful approach when describing a modern legal system.

The Judge, the Future and Justice

PETER BLUME

The theme of this article is the courts as producers of precedents. It is considered to which extent the personality of the individual judge influences decisions and whether the judge regards justice now and in the future as relevant when drafting the reasoning of his decision. These questions are viewed from the perspective of Danish legal culture. It is assumed that there may be a dichotomy between correctness and justice; that the judge has gained more freedom due to the increased complexity of the legal system; and that there sometimes may be a

gap between the published reasoning of a decision and the deliberations of the participating judges. The last issue is discussed taking the practice of the Danish Supreme Court into consideration. It is concluded that there may be dishonest court decisions in the sense that such decisions do not truly reflect the deliberation of the court and that these decisions may function as precedent. Sometimes future law may accordingly be introduced by what may be perceived as a mistake.

»American Exceptionalism – Carl Schmitt and the Neo-conservative justification for the Political«

STÅLE R.S. FINKE

This article takes issue with ideas of political sovereignty, decision and the rule of law within recent American neo-conservatism. It is argued that there is a close affinity between certain ideas of the neo-conservative movement - such as its cultural criticism, critique of liberalism and disregard for institutionally secured rights, together with its downgrading of binding international law - and the political philosophy of Carl Schmitt. This focus makes it clear what the stakes are in the recent discussions on the implications of political exceptionalism: It is shown that the Schmittian conception of sovereignty, which

strips the liberal constitution and the project of international law of normative content, is dependent upon a specific view of the internal relation of history and politics which exclusively affirms the contingency and facticity at its core. However, the liberal tradition from Kant to Habermas was already at the outset aware of the implications of contingency for the justification of the political and the rule of law. Hence, the argument from exceptionalism can be met from within the liberal tradition itself, in terms of its justifications for the normative grounds of constitutionally guaranteed rule of law.

Dispute Settlements in Sport: A Socio-Legal Reflection on the Ethics and the Legal Culture of Sport

BO CARLSSON & DAVID HOFF

»By focusing on various methods of solving disputes in sport, the essay brings light to the legal culture of sport. The first subject is related to informed consent and reciprocal lumping. The second issue is formal and discretionary powers among the referees,

which is followed by a reflection on different sports associations' internal disciplinary sanctions. The final dispute resolution is the legal systems, and the dealing with sport-related violence. The reasoning ends up with a reflection on the ethical

standard of modern sport, as well as the relation between the autonomy of sport

and the juridification of sport, and its implications.«

Does anyone have exclusive tangible rights to genetic resources found in Norway?

MORTEN WALLØE TVEDT

The article »Does anyone have exclusive tangible rights to genetic resources found in Norway?« discusses a topic which has previously not been explored in Norwegian legislation: property rights to genetic resources. The present development in the field of biotechnology has increased the value of the genes as the building blocks of life. The increased value has triggered difficult issues regarding who has exclusive rights or property rights to the use of genes. This article aims at exploring to what extent there are private property rights to genetic resources according to the current legal situation in Norway (*de lege lata*). Three types of legal mechanisms are particularly relevant for establishing exclusive rights to genes: patent (or other intellectual

property rights), contracts and tangible property rights. This article explores the latter, and demonstrates that a tangible property right to combined with physical control over the biological material is the most relevant manner to have an exclusive right to the genes. According to present Norwegian legislation there are no particular tangible property rights that establish exclusive rights to the use of genetic resources. The article demonstrates the differences between types of organisms; and concludes that the present situation leaves the legislator with a great deal of discretion when addressing and regulating the topic property rights to genes in all types of organisms.
